

APR 6 19

U.S. DEPT. OF JUSTICE

INT.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PURVIS TYRONNE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

Argued October 1, 1990
Decided October 1, 1990

DISBURSALS OF THE
CRIMINAL JUSTICE FOUNDATION
TO PURVIS TYRONNE PAYNE

Kerry S. SCHROEDER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

BEST AVAILABLE COPY

QUESTION PRESENTED

Should *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) be overruled?

TABLE OF CONTENTS

Interest of amicus curiae	1
Summary of facts and case	2
Summary of argument	3
Argument	3
I	
Evenhandedness should be the sole basis of constitutional restrictions on capital sentencing procedure	3
A. Stare decisis and its limitations	3
B. <i>Furman v. Georgia</i>	7
C. The <i>Woodson</i> departure	9
II	
<i>Booth</i> should be overruled in part	13
A. Emotional impact on the family	13
B. Opinions and statements of family members	17
III	
<i>Gathers</i> should be overruled completely	17
IV	
The testimony and argument in the present case were proper	19
Conclusion	20

TABLE OF AUTHORITIES

Cases

Booth v. Maryland, 482 U. S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)	3, 7, 13, 15, 16, 17
Boyde v. California, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)	15
Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963)	6
Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)	3, 8, 9, 16
Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)	8, 9
Helvering v. Hallock, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444 (1940)	6, 7
Helvering v. St. Louis Union Trust Co., 296 U. S. 39, 80 L. Ed. 29, 56 S. Ct. 74 (1935)	6
Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976)	9
Klein v. United States, 283 U. S. 231, 75 L. Ed. 996, 51 S. Ct. 398 (1931)	6
Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)	16
Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)	4, 8
McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)	18

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971)	7, 8
Mistretta v. United States, 488 U. S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)	10, 11
People v. Sirhan, 7 Cal. 3d 710, 487 P.2d 1121 (1972)	19
Profitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)	9
Skipper v. South Carolina, 476 U. S. 1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986)	15
South Carolina v. Gathers, 490 U. S. 805, 104 L. Ed. 2d 876 109 S. Ct. 2207 (1989)	3, 7, 18
State v. Payne, 791 S. W. 2d 10 (Tenn. 1990)	2, 19
Sumner v. Shuman, 483 U. S. 66, 97 L. Ed. 2d 56, 107 S. Ct. 2716 (1987)	11
United States v. Title Insurance & Trust Co., 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924)	4
United States v. Ray, 920 F. 2d 562 (CA9 1990)	11
Vasquez v. Hillery, 474 U. S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986)	5
Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)	6
Walton v. Arizona, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)	12, 14
Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)	9, 10, 16
United States Constitution	
U. S. Const. amend. XIV, § 1	12

State Statutes	
Cal. Pen. Code § 211-213	14
§ 243(a)	14
§ 263	14
§ 264(a)	14
§ 460	14
§ 486	14
§ 490	14
Rules of Court	
Federal Rules of Evidence 403	15
Treatises	
Blackstone, <i>Commentaries</i> 389 (1769)	10
Chamberlain, <i>The Doctrine of Stare Decisis: Its Reasons and Its Extent</i> (1885)	4
J. Nowak, R. Rotunda, J. Young, <i>Constitutional Law</i> (3rd ed. 1986)	8
Miscellaneous	
Black's Law Dictionary (5th ed. 1979)	3
Cassou & Taigher, <i>Determinate Sentencing in California: The New Number Game</i> , 9 Pac. L.J. 1 (1978)	10
Douglas, <i>Stare Decisis</i> , 49 Colum. L. Rev. 735 (1949)	5, 8
Maguire, <i>The Impact of Burglary Upon Victims</i> , 20 Brit J. of Criminology 261 (1980)	14
Model Penal Code (1990)	14
Scheidegger, <i>Capital Punishment in 1987: The Puzzle Nears Completion</i> , 15 West. St. L. Rev. 95 (1987)	9, 12, 18
J. Wilson, <i>Thinking About Crime</i> (1975)	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PURVIS TYRONE PAYNE,
Petitioner,
vs.
STATE OF TENNESSEE,
Respondent.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a rule which has prohibited sentencing juries from considering the full measure of the harm that murderers cause to the victims of their crimes. That rule

1. Both parties have consented in writing to the filing of this brief.

is contrary to the rights of victims which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Charisse Christopher lived in an apartment with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. Neighbors heard bloodcurdling screams and called the police. *State v. Payne*, 791 S. W. 2d 10, 11 (Tenn. 1990). A policeman saw defendant leaving the apartment, covered with blood. *Id.*, at 12.

Police arriving at the apartment found blood all over the walls and floor. Nicholas was alive, but had stab wounds completely through his body damaging most of the abdominal organs. *Ibid.*

Charisse and Lacie were dead. Charisse had 42 stab wounds and Lacie had nine. *Ibid.*

Defendant was convicted of the murder. *Id.*, at 11. During the penalty phase, Nicholas's grandmother gave this testimony:

"Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?

"A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie." *Id.*, at 17-18.

During closing argument, the prosecutor commented on the impact of the deaths on Nicholas. *Id.*, at 18. In response to defense argument that defendant had lived an "exemplary life," he said that Charisse and Lacie had also "lived exemplary lives. But they are not here with us anymore." *Id.*, at 19.

The state supreme court rejected defendant's claims under *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989). 791 S. W. 2d, at 18-19. This Court granted certiorari and requested briefing on whether *Booth* and *Gathers* should be overruled. 48 BNA CrL 3147. The Court later amended the grant of certiorari to limit it to the *Booth/Gathers* issue. 48 BNA CrL 3152.

SUMMARY OF ARGUMENT

On matters of criminal procedure, the doctrine of stare decisis rests primarily on the need to insure that the law develops in a principled and intelligible fashion. Where a body of law has developed erratically and where anomalies have arisen, overruling anomalous precedents furthers the goal that the doctrine of stare decisis is intended to protect.

Booth v. Maryland, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) are the product of erratic development of the law of federal restrictions on state capital punishment. They are contrary to the fundamental principles of evenhandedness which underlies *Furman v. Georgia*, 408 U. S. 238 (1972). They should therefore be overruled.

ARGUMENT

I. Evenhandedness should be the sole basis of constitutional restrictions on capital sentencing procedure.

A. Stare Decisis and Its Limitations.

Any suggestion that a precedent be overruled must address the doctrine of stare decisis. The full expression is *stare decisis et non quieta movere*, which means to adhere to precedents and not to unsettle things which are established. *Black's Law Dictionary* 1261 (5th ed. 1979). The limitations of the doctrine are shaped by the purposes of the doctrine.

Reliance is one major purpose. People need to rely on a consistent interpretation of the law in order to shape their own conduct.

"Law, to be obeyed, must be known; to be known, it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths." Chamberlain, *The Doctrine of Stare Decisis: Its Reasons and Its Extent* 26 (1885).

The reliance interest is most common in the substantive law of property and contracts, where people must order their transactions on a settled body of law. It is often said that *stare decisis* has the greatest strength in this area. See, e.g., *United States v. Title Insurance & Trust Co.*, 265 U. S. 472, 486-487 (1924). In the substantive criminal law there is also reliance, however. A person who does an act previously deemed legal should not be punished if the interpretation of the law is changed after the act. However, this protection is provided through limitations on retroactivity even without relying on *stare decisis*. See, e.g., *Marks v. United States*, 430 U. S. 188, 196-197 (1977).

In criminal procedure, the reliance interest lies almost entirely on the side of the prosecution, because only the prosecution needs to defend its judgments on appeal and on habeas corpus. A defendant who successfully relies on an existing procedure at trial is acquitted, and the Double Jeopardy Clause protects him from reversal on appeal. Only in exceedingly rare situations would reliance be a factor in resisting a change in an existing procedural rule which presently favors the defense.²

The importance of procedural precedent favoring criminal defendants therefore rests on considerations other than reliance. One summary can be found in *Vasquez v. Hillery*, 474 U. S. 254, 265-266 (1986) (citation omitted):

"[T]he important doctrine of *stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' "

Notwithstanding the last clause, however, "experience and facts newly ascertained" are not the only reasons for overruling precedent. Some bodies of law have *not* "develop[ed] in a principled and intelligible fashion." Sometimes it is painfully obvious to society that principles announced as "bedrock" are *in fact* founded in the proclivities of individuals and not in the law.

Where this is true, the fundamental reason for adherence to precedent set forth so eloquently in *Hillery* does not exist. When a body of law has followed a zigzag course through a long series of narrowly-divided votes (or, even worse, fractured decisions with no majority) problems are certain to arise. Opinions strain to distinguish cases which are not really distinguishable, and anomalies are created. Overruling the anomalies promotes, rather than hinders, the principled and intelligible development of the law. Leaving the anomalies in place leaves lower court judges and lawyers shaking their heads in bewilderment. See Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 749 (1949).

2. Restriction on the use of immunized testimony is one example that comes to mind.

Reluctance to squarely overrule a precedent can defeat the very stability interests that *stare decisis* is supposed to protect. For example, 13 years after *Wainwright v. Sykes*, 433 U. S. 72 (1977) this Court granted certiorari to consider, among other questions, whether *Sykes* really overruled *Fay v. Noia*, 372 U. S. 391 (1963). See Petition for Certiorari in *Coleman v. Thompson*, No. 89-7662, question 4. That question should have been answered long ago.

The classic example of overruling a case to remove an anomaly is *Helvering v. Hallock*, 309 U. S. 106 (1940). The case dealt with estate tax on property transferred to a trust by the decedent during his lifetime. *Id.*, at 109. *Klein v. United States*, 283 U. S. 231 (1931) had held that property was included in the estate for tax purposes when the grantor had conveyed a life estate to his wife during his lifetime with the remainder to follow if the grantor died first. *Klein* rejected reliance on the fine points of the law of future interests and looked instead to the practical effect of the transmission of property from the dead to the living, which is the taxable event under the estate tax law. *Id.*, at 234.

In *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935), the grantor conveyed his legal title to a trust for the benefit of his daughter with the provision that if the daughter died first the trustee was to convey the property back to the grantor. The majority distinguished *Klein* and held that the property was not part of the estate. "Unlike the *Klein* Case, where the death was the generating source of the title, here . . . the trust instrument and not the death was the generating source." *Id.*, at 45-46.

The *Hallock* Court rejected the call to harmonize these decisions. While *Klein* and *St. Louis Union Trust* were factually distinguishable, the underlying rationale of the *Klein* decision was in conflict with the later case. *Hallock, supra*, 309 U. S., at 118-119. With that possibility rejected, the remaining question was not whether to follow precedent but which precedent to follow. *Hallock* also rejected the notion that the later case was necessarily the one to follow.

"We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.*, at 119.

Do the rules of *Booth v. Maryland*, 482 U. S. 496 (1987) and *South Carolina v. Gathers*, 490 U. S. 805 (1989) collide with a doctrine more embracing in scope and intrinsically sounder? Would overruling them help straighten the path of the law and contribute to its principled and intelligible development? Would overruling promote rather than inhibit public confidence that constitutional doctrine is based upon law rather than the proclivities of individuals? These are questions which should inform and guide the decision to overrule or not overrule. To answer them, we first return to square one.

B. Furman v. Georgia.

Does the Eighth Amendment regulate the procedure by which the punishment is determined? That is, can a given sentence for a given defendant for a given crime be "cruel and unusual" or not depending on the procedure by which that punishment is imposed? On its face, the idea of "procedurally cruel and unusual punishment" seems absurd. Yet the existence of such a concept is uniformly considered to be the law of the land. This tortured misconstruction of the Eighth Amendment is a case study in the misuse of precedent.

The trail begins with *McGautha v. California*, 402 U. S. 183 (1971). McGautha challenged the procedures by which capital punishment was imposed under the Due Process Clause. Justice Harlan, writing for the majority, rejected the argument in a long and careful opinion. Justice Black concurred with a brief but profound statement. "Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never

believed that lifetime judges in our system have any such legislative power." *Id.*, at 226.

The next assault was made on the grounds of the Eighth Amendment. How can the purely substantive prohibition against cruel and unusual punishment be relevant to a procedural objection? Two answers are suggested in the various opinions in *Furman v. Georgia*, 408 U. S. 238 (1972): (1) it is not relevant, see *id.*, at 397 (Burger, C. J., dissenting); or (2) it is relevant if a state's procedure contains such systemic defects as to render *all* of the state's death sentences unconstitutional, see *id.*, at 256-257 (Douglas, J., concurring); *id.*, at 310 (Stewart, J., concurring); *id.*, at 313 (White, J., concurring). The three opinions which accepted the second answer have been deemed the opinion of the Court. *Gregg v. Georgia*, 428 U. S. 153, 169, n. 15 (1976).³

Justice Douglas's opinion relies on the Eighth Amendment in name only. Beneath the transparent membrane is a pure equal protection argument, and Justice Douglas relies explicitly on the Equal Protection Clause in his conclusion. 408 U. S., at 257. Yet Justice Douglas felt "imprisoned in the *McGautha* holding." *Id.*, at 248. This is a strange and uncharacteristic statement. Cf. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). Perhaps it was out of respect for a recently deceased colleague.

Justice White's opinion was clearly addressed to the statewide effect of the purely discretionary imposition of the punishment in a large class of cases theoretically eligible for the punishment. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U. S., at 313. Is this not also an equal protection argument? Different treatment of similarly situated people without a "meaningful" (or "rational") basis is the very heart of equal protection analysis. See J. Nowak, R.

Rotunda, J. Young, *Constitutional Law* § 14.2, at 525 (3rd ed. 1986).

Justice Stewart's reasoning is essentially the same. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [T]he petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed." 408 U. S., at 309-310. Inequality, not cruelty, is the heart of the problem.

C. The Woodson Departure.

The next set of cases also dealt with systemic challenges to the entire capital sentencing scheme of states. Georgia's system of "guided discretion" was approved. *Gregg v. Georgia*, 428 U. S. 153 (1976). So was Florida's substantially similar system. *Proffitt v. Florida*, 428 U. S. 242 (1976). The Texas system of basing the sentence primarily on future dangerousness was approved, but the plurality conditioned its approval on a strained construction of the statute. *Jurek v. Texas*, 428 U. S. 262, 272 (1976).

North Carolina's statute imposing a mandatory death sentence for a sweeping variety of murders was struck down in *Woodson v. North Carolina*, 428 U. S. 280 (1976). The plurality gave three reasons. One of the three was fully consistent with the underlying equal protection rationale of *Furman*; another set off on a collision course with it.

The plurality's first reason was a finding that the North Carolina law "departs markedly from contemporary standards." *Id.*, at 301. This reason is entirely unrelated to *Furman* and need not be considered further here. The second reason was a disbelief that this sweeping statute would ever be enforced as written. Widespread jury nullification and prosecutorial decisions not to charge were inevitable. *Woodson v. North Carolina*, 428 U. S. 280, 302-303 (1976). The point is well taken. These inevitable nullifications would have occurred on an arbitrary and possibly racist basis, just as the old standardless jury discretion system had granted arbitrary leniency. See Scheidegger, *Capital Punishment in 1987: The Puz-*

3. The *Gregg* opinion is itself a plurality, but the point was accepted by a majority in *Marks, supra*, 430 U. S., at 143.

zle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987).

The last ground for the plurality's decision was a bolt from the blue. Despite an acknowledged lack of precedent for any constitutional requirement for individualized sentencing, see 428 U. S., at 296, 304, the plurality created one. The Eighth Amendment now required individualized consideration not only of the crime but also "the character and record of the individual offender." *Id.*, at 304. The sovereign power of the people of the states to decide through the democratic process to prescribe a given punishment for a given crime and to uniformly enforce that punishment thus vanished in a cloud of blue smoke. The power to grant mercy for capital offenses, vested in the chief executive for centuries, see 4 W. Blackstone, *Commentaries* 389 (1769), was now constitutionally required to be shared with a single judge or with 12 private citizens. Justice Black's admonition from *McGautha* was forgotten.

The *Woodson* plurality raised discretionary sentencing to a constitutional mandate on the basis of what it perceived to be a long established and universally accepted consensus, 428 U. S., at 296-297, and "prevailing practice," *id.*, at 304. In fact, belief in discretionary sentencing had peaked before *Woodson* and was already on the decline. Professor James Q. Wilson had published his influential book *Thinking About Crime* the previous year, asserting, among other cogent arguments, that discretionary sentencing had gone much too far. He proposed that criminal penalties "be primarily designed to fit the crime, with some (but not much) range for judicial discretion . . ." J. Wilson, *Thinking About Crime* 180 (1975). California enacted its pioneering Determinate Sentencing Law the same year as *Woodson*, eliminating administrative term-fixing for most crimes and limiting judicial sentencing discretion to a few structured choices. See Cassou & Tausher, *Determinate Sentencing in California: The New Number Game*, 9 Pac. L.J. 1, 24-25 (1978). Also in the same year, Congress recognized a need "to moderate the disparities in the sentencing practices of individual judges." See *Mistretta v. United States*, 488 U. S. 361, 365 (1989). Only eight years later, Congress adopted a sweeping reform to implement a mandatory guideline system.

See *id.*, at 362-368.

The reason for this widespread disenchantment with discretionary sentencing is precisely in accord with the principle of *Furman*. Too much discretion creates arbitrary results. The punishment should fit the crime, not the chancellor's foot.⁴ Yet *Woodson* caught the falling star of discretionary sentencing and placed it at the zenith of the law. This portion of *Woodson* announced a "bedrock principle" which was not founded on the law but rather on the proclivities of individuals.

The collision between *Furman* and the last portion of *Woodson* became most apparent in *Sumner v. Shuman*, 483 U. S. 66 (1987). That case involved a leftover statute from pre-*Woodson* mandatory sentencing. The Nevada statute provided a mandatory death sentence for murder by inmates already sentenced to life in prison without possibility of parole. *Id.*, at 67.

Unlike the very broad statute in *Woodson*, this very narrow statute was eminently capable of being enforced as written. With its specific and objective criteria for application, the chance of arbitrary and capricious imposition was as close to zero as the criminal law can come. Yet the statute was struck down for violating the foundationless rule of *Woodson* requiring discretionary sentencing regardless of whether there would be arbitrary nullification. *Id.*, at 85. Only two kinds of punishment are available for life-without-parole prisoners: (1) death and (2) administrative sanctions such as more restrictive confinement or denial of clemency. The latter are punishments that are typically imposed without trial and for far lesser offenses than premeditated murder. *Shuman* thus holds that a jury must be permitted to let some two-time murderers go

4. "For the benefit of members of the bar who might try and guess how I will exercise this discretion, let the record reflect that I wear a 9 1/2 wide." *United States v. Ray*, 920 F. 2d 562, 569 (CA9 1990) (Kozinski, J., dissenting).

essentially unpunished for the second murder, while others are put to death for the same crime. To punish them all the same would be "cruel and unusual," we are told.⁵

It is time, amicus submits, to take the same step the Court took in *Helvering v. Hallock*. It is time to recognize that two lines of precedent are in irreconcilable conflict. One of them must be jettisoned to maintain the "principled and intelligible" development of the law.

The evenhandedness doctrine of *Furman v. Georgia* is more embracing in scope and intrinsically sounder. Equal protection is expressly mandated by the Constitution. U. S. Const. amend. XIV, § 1. The *Woodson-Shuman* rule that the sentencer must make a discretionary judgment, regardless of whether evenhandedness requires such discretion, was created out of whole cloth. The presence in the law of two contradictory grounds for reversing capital sentences is due in substantial part to "the proclivities of individuals" who, despite precedent, have provided two automatic votes to reverse every sentence regardless of the defendant's theory. To invoke the doctrine of stare decisis to preserve an anomaly created through defiance of precedent is directly contrary to the purpose of that doctrine as set forth in *Hillery*.

To eliminate the conflict, the rule should be that evenhandedness is the *only* source of federal constitutional limitations on capital sentencing procedure. Rules which directly and substantially promote that goal should remain in effect, and those which do not should no longer be considered federal questions. "Thus, the procedural elements of a sentencing scheme come within the prohibition [of the Eighth Amendment], if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment 'unusual.'" *Walton v. Arizona*, 111 L. Ed. 2d 511, 539, 110 S. Ct. 3047, 3066 (1990) (Scalia, J., concurring).

5. *Shuman* is discussed in somewhat more detail in Scheidegger, *supra* p. 9, 15 West. St. L. Rev., at 118-120.

With this in mind, we turn to the issues at hand.

II. *Booth* should be overruled in part.

In *Booth v. Maryland*, 482 U. S. 496 (1987), the defendant robbed and murdered an elderly couple, Irvin and Rose Bronstein. *Id.*, at 497. A victim impact statement (VIS) was prepared based on interviews with the Bronstein's son, daughter, son-in-law, and granddaughter. *Id.*, at 499. The majority summarized the contents this way:

"The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Id.*, at 502.

Actually, the VIS provided *three* types of information, not two. The emotional impact on the family is different from the personal characteristics of the victims and needs to be analyzed separately. In the remainder of this part, we will discuss emotional impact and family opinions, reserving personal characteristics for the discussion of *Gathers* in part III.

A. Emotional Impact on the Family.

The blameworthiness of a criminal's conduct is not and never has been dependent solely on the extent of physical injury and property damage. Since the early days of the common law, many crimes have been recognized as more serious because of the emotional damage inflicted.

The most obvious example is rape. The physical injury is often no greater than that in a misdemeanor battery; it may

even be less. Yet in California, for example,⁶ simple battery is a misdemeanor punishable by only six months in jail, Cal. Pen. Code § 243(a), while rape is a felony punishable by three, six, or eight years in state prison, *id.*, § 264(a). The difference is “the outrage to the person and feelings of the victim.” *Id.*, § 263.

If a person takes a small amount of money from another by stealth, that is petty theft, a misdemeanor. See, e.g., *id.*, §§ 486, 490. If he takes the same property by force, even without inflicting any physical harm, that is robbery, a felony. *Id.*, §§ 211-213. The robber is punished more severely because of the psychological harm he causes, not only to his immediate victim but also to society at large. See Model Penal Code § 222.1 Comment at 98 (1980).

The property damage caused by burglary of a warehouse is the same as that caused by burglary of a home, yet the latter is generally recognized as a greater offense. See, e.g., Cal. Pen. Code § 460; Model Penal Code § 221.1. One major difference is the psychological harm caused by invasion of the home. See generally Maguire, *The Impact of Burglary Upon Victims*, 20 Brit. J. of Criminology 261 (1980).

The *Booth* majority called the collateral injury to the family members “wholly unrelated to the blameworthiness of a particular defendant.” 482 U. S., at 504. If capital sentencing is to be discretionary, the entire purpose of the penalty phase must be to separate some murders as being more deserving of punishment than others, even though every homicide results in death. Additional harm beyond the death would seem to be a highly relevant factor in making such a separation.

As Justice Scalia has pointed out, the sentencing decision is a unitary one. The decision to grant leniency cannot be separated from the decision to deny it. *Walton v. Arizona*, 111

6. California law is used here as a convenient example. Most states have similar distinctions among crimes.

L. Ed. 2d 511, 537, 110 S. Ct. 3047, 3064 (1990) (concurring opinion). The presence of a factor and the absence of the same factor are equally relevant. The relevance of the evidence sought to be excluded can be judged only in relation to other evidence which is permitted or even required to be admitted.

What evidence is *more* relevant than the degree of additional harm the defendant has caused? In *Boyde v. California*, 108 L. Ed. 2d 316, 330, n. 5, 110 S. Ct. 1190, 1199 (1990), the defendant introduced evidence that he had won a dance choreography award while in prison. The state was constitutionally required to admit this evidence. *Skipper v. South Carolina*, 476 U. S. 1 (1986). Is artistic ability or lack of it more relevant than the harm or lack of harm caused to third persons by the crime? Most people would believe that additional harm is more relevant than artistic ability and more relevant than the bulk of similar character evidence introduced in capital sentencing proceedings.

The *Booth* majority considered the additional harm irrelevant because it is, in most cases, unintended by the killer. 482 U. S., at 504-505. An example illustrates the fallacy of this reasoning. Suppose that a gunman shot his target on a crowded subway, and the bullet passed through the victim, killing him and injuring another person. That additional *physical* injury would certainly be relevant. While the defendant may not have intended it, he recklessly created the danger that it would happen. Why should other kinds of loss be different? Loss to others is the natural and probable consequence of a death. If the killer acts with disregard of that possibility, it is not unfair to charge him with the consequences.⁷

7. Some of the damage in *Booth* was quite attenuated, such as the pall cast over a relative's wedding. 482 U. S., at 500. Such evidence should generally be excluded under state equivalents of Rule 403 of the Federal Rules of Evidence, but it need not be a constitutional question.

The portion of *Booth* excluding this evidence is a twisted offshoot from the illegitimate branch of *Woodson v. North Carolina*, *supra*. As expanded in *Lockett v. Ohio*, 438 U. S. 586 (1978), that doctrine requires the sentencer to consider “*as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.*, at 604 (emphasis in original). *Booth* builds another layer on the top of this foundationless tower, citing *Woodson*’s out-of-the-blue “uniquely individual human being” requirement. 482 U. S., at 504. *Booth* holds in effect that a statute permitting consideration of *any other factors* will result in a form of strict scrutiny nearly certain to be fatal. See *id.*, at 502. Further, while any limitation on “circumstances of the offense” that the defendant may put forward risks a reversal for “*Skipper error*,” circumstances offered by the prosecution must, apparently, be limited to those immediately obvious at the scene.

However this debate might be resolved in a state legislature or a state court, the sole federal question should be whether the consideration of the harm to third persons renders the imposition of the death penalty arbitrary and capricious. Returning to the original language of the controlling opinions in *Furman v. Georgia*, 408 U. S. 238 (1972), is there any danger that allowing such evidence will cause the death penalty to be applied “selectively to minorities”? See *id.*, at 245 (Douglas, J.). Would it render those sentenced to death a “capriciously selected random handful”? See *id.*, at 309-310 (Stewart, J.). Would it render the penalty “so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others”? See *id.*, at 312 (White, J.). These are the questions that should be asked if the law is to remain true to *Furman*. The answers are clearly no.

Additional psychological harm to third persons is relatively objective compared to most penalty phase evidence. Its receipt into evidence and consideration by the jury will make sentencing less random, less arbitrary, and more closely related to what the defendant has actually done. That should end the federal inquiry.

B. Opinions and Statements of Family Members.

Booth involved a factor not involved in the present trial, and the Court may not wish to rule on it. If *Booth* is otherwise overruled, however, it may be worth a footnote.

The VIS in *Booth* included statements by the family members of their opinions about the case. 482 U. S., at 500. These statements were read from a text by the prosecutor, but apparently in-person statements were sometimes used. *Id.*, at 499.

Unlike the rule concerning impact on the family, a rule excluding their opinions and arguments does not collide with *Furman*, and the stare decisis argument is stronger here. While the injury to the family is relevant to culpability, the family’s eloquence in expressing their outrage is not. *Id.*, at 505. It is a random factor, a kind best avoided. While the rule probably should not be a constitutional one, there is no compelling reason to overrule it.

III. Gathers should be overruled completely.

The *Booth* majority made an important point about equal protection for victims, citing Justice Douglas’s *Furman* opinion. “We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.” *Booth v. Maryland*, 482 U. S. 496, 506, n. 8 (1987).

It is a troubling point, and counsel for amicus once defended the *Booth* ruling on this ground.

“Suppose A murders a prominent attorney from a large and wealthy family and B murders a bum on skid row under otherwise identical conditions. Can we morally punish A more harshly than B? If we do, are we not denying the bum equal protection of the laws in

the deepest and most fundamental sense?" Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 West. St. L. Rev. 95, 117 (1987).

This position is theoretically sound but erroneous in practice. The error was dramatically demonstrated in *South Carolina v. Gathers*, 490 U. S. 805 (1989).

"Reverend Minister" Richard Haynes was a man some people might consider a "bum." He was unable to hold a job. He rotated in and out of mental hospitals. He believed himself to be a minister and walked around carrying several bags of religious articles and talking to people about God. *Id.*, at 807, 809.

Victims depend for their vindication on the zeal of prosecutors. There is always an underlying concern that the zeal may be less intense when the victim is from the lower strata of society or a disfavored racial group. See, e.g., *McCleskey v. Kemp*, 481 U. S. 279, 346-347 (1987) (Blackmun, J., dissenting). The prosecutor in *Gathers* rose to the challenge.

If there is ever a prosecutors' hall of fame, the *Gathers* prosecutor deserves a place there. Faced with the very real possibility that the jury might brush off the late Mr. Haynes as a crazy, no-account bum, he made a stirring argument on the basis of Mr. Haynes's religious tract and voter registration card. He demonstrated to the jury that Mr. Haynes, despite his problems, had a life worth living. *Id.*, at 808-810.

Looking across the landscape of American law, would allowing this kind of argument make the administration of the death penalty more or less evenhanded? The problem is a mirror image of the evenhandedness portion of *Woodson*.⁸ A statute directing that all mitigating circumstances be ignored was evenhanded on its face, but it would never be enforced that way in practice. It is better to give the jury guidance on

factors we know they will consider anyway. The same is true of the personal characteristics of the victim.

Notwithstanding our prior position, amicus submits that *Gathers*-type argument should be allowed. Where the victim is a pillar of the community the jury will either know that fact going in or they will learn it from incidental information picked up in the course of the trial. Where the victim's qualities lie beneath the surface, argument like the one in *Gathers* is needed to provide those victims with equal protection.

The jury in *Gathers* needed to be told what kind of life had been snuffed out. The jury in *People v. Sirhan*, 7 Cal. 3d 710, 497 P. 2d 1121 (1972) already knew.

IV. The argument in the present case was proper.

If *Gathers* is overruled and if the portion of *Booth* regarding psychological impact on the family is overruled, then the result in this case is beyond question. The grandmother's testimony about the impact on Nicholas and the prosecutor's argument were clearly proper. Justice Fones said it best in his opinion for the Tennessee Supreme Court, *State v. Payne*, 791 S. W. 2d 10, 19 (1990):

"It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."

8. See *supra* p. 9.

CONCLUSION

The judgment of the Tennessee Supreme Court should be affirmed.

Dated: April, 1991

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*